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No. 94-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

On Appeal from a Three-Judge Panel of the United States District Court for the Western District of Louisiana

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether Louisiana Act 1 was properly subjected to strict scrutiny when a three-judge panel unanimously found it was so bizarre on its face that it could be understood only as an effort to segregate voters by race.

2. Whether Louisiana has a compelling interest in racial gerrymandering when there has been no showing that a second majority-minority district is required by the Voting Rights Act or otherwise necessary to remedy discriminatory voting practices in Louisiana.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

A. Background of Plaintiffs' Challenge to Louisiana's Congressional Redistricting 3

B. The Challenge to Act 42 4

C. The Legislature's Replacement of Act 42 with Act 1 and the Three-Judge Panel's Subsequent Invalidation of Act 1 6

1. The Court's Factual Findings 7

2. The Court's Legal Conclusions 10

GROUNDS FOR AFFIRMANCE 11

I. THERE IS NO BASIS TO DISTURB THE DISTRICT COURT'S FINDING THAT DISTRICT 4 RATIONALLY CAN BE UNDERSTOOD ONLY AS AN EFFORT TO SEGREGATE VOTERS BY RACE 14

A. The *Shaw* Decision 14

B. Under *Shaw*, District 4 Is So Bizarre On Its Face That It Can Be Explained Only As A Racial Gerrymander 16

1. District 4 is Bizarre 16

2. The State Failed to Justify Act 1 on Race-Neutral Grounds 19

C. There Is No Split of Authority About Whether District 4 Is Subject to Strict Scrutiny 21

II. ACT 1 IS NOT JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST 22

A. The Voting Rights Act Does Not Require Louisiana to Create a Second Majority- Minority District 22

1. Section 5 23

2. Section 2 26

B. The State Failed to Show Discrimination In Past Voting Practices 27

III. APPELLANTS' OTHER ARGUMENTS ARE WITHOUT MERIT 28

A. The Plaintiffs Have Standing to Challenge Act 1 28

B. The District Court Did Not Employ Irregular Trial Procedures 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Batson v. Kentucky,
476 U.S. 79 (1986) 29

Beer v. United States,
425 U.S. 130 (1976) 2, 13, 24

Chisom v. Roemer,
111 S. Ct. 2354 (1991) 13

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 13, 23, 27

City of Richmond v. United States,
422 U.S. 358 (1975) 25

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 15

Growe v. Emison,
113 S. Ct. 1075 (1993) 13

Hays v. Louisiana,
839 F. Supp. 1188 (W.D. La. 1993) 4

Holder v. Hall,
114 S. Ct. 2581 (1994) 13

Johnson v. DeGrandy,
114 S. Ct. 2647 (1994) 11

Johnson v. Miller,
No. 194-008, 1994 WL 506780
(S.D. Ga. Sept. 12, 1994) 10, 21, 26

Shaw v. Hunt,
No. 92-202-Civ-5-BR, 1994 WL 449347
(E.D.N.C. Aug. 1, 1994) 28

Shaw v. Reno,
113 S. Ct. 2816 (1993) ..... *passim*

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 13

Thornburg v. Gingles,
478 U.S. 30 (1986) 2, 11, 26

United Jewish Org. of Williamsburg v. Carey,
430 U.S. 144 (1977) 13

Statutes and Rules

Voting Rights Act,
42 U.S.C. § 1973 et seq. ..... *passim*

28 C.F.R. § 51.22(b) (1993) 10

28 C.F.R. § 51.54(b) (1993) 24

Louisiana Act 1 ..... *passim*

Louisiana Act 42 ..... *passim*

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MOTION TO AFFIRM

Appellees respectfully urge that the Court affirm the judgment below invalidating Louisiana Act 1. Act 1, like its predecessor Act 42, segregates black and white voters intentionally and disproportionately into separate districts by race. District 4, in particular, is a bizarre construction built from blocks of black voters split from twelve different parishes scattered along a 250-mile-long axis. With white voters from the same parishes reciprocally concentrated in adjacent districts, the three judge panel correctly found a constitutionally suspect racial gerrymander under *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

No compelling state interest justifies Louisiana's frank attempt to create a political culture of reciprocal racial domination. This Court distinguished in *Shaw* between what the Voting Rights Act, 42 U.S.C. § 1973 et seq. (VRA) "permits, and what it requires," and stressed that the three conditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986), "never can be assumed but specifically must be proved in each case." 113 S. Ct. at 2830. No such factual proof was made below by either the Justice Department (DOJ) or Louisiana.

The retrogression principle of Section 5 of the VRA does not require Act 1 because the power of Louisiana's black voters would be enhanced following the 1990 census even without a second majority-minority district. *Beer v. United States*, 425 U.S. 130, 141 (1976). Nothing in the VRA requires Louisiana to include a second majority-minority district. Appellants retreat instead to the tenuous contention that a second black district was required because Louisiana "reasonably believed" that it would have had difficulty showing that its failure to create such a district "was free of discriminatory purpose." (U.S. J.S. 19). But even if that test could be squared with the VRA and were otherwise constitutional, there is no record evidence to support its application in this case, and accordingly, the decision below must be affirmed.

STATEMENT OF THE CASE

From start to finish, race has been the controlling consideration in drawing Louisiana's Congressional districts in response to the 1990 census. But the blame for resegregating Louisiana does not lie only with the State Legislature. From 1991 onward, the DOJ, under cloak of its Section 5 authority, threatened and cajoled the Legislature into creating two black districts and five white districts. The Legislature twice now has done DOJ's bidding only to have its gerrymandered districts invalidated by a panel of three Louisiana federal judges. This appeal turns entirely on whether the facts found by the court

below satisfy the requirements of *Shaw* and this Court's other precedents.

A. Background of Plaintiffs' Challenge to Louisiana's Congressional Redistricting

All four plaintiffs are registered Democrats. Ray Hays is white and has spent many years working as a grassroots political organizer. He has seen racial polarization weaken and divide blacks and whites in Louisiana and across the country. As a State Committee Member of the Democratic Party from a minority district, he has worked to elect black candidates in Louisiana not by concentrating only on black voters, but by building broad-based support of all voters. He brought this suit as the only available means of fighting the alarming trends he perceived in the democratic process. Plaintiff Ed Adams was the first black in his field to enter Louisiana State University, and was one of the first public school principals in Orleans parish. Plaintiff Gary Stokley is a tenured sociology professor at Louisiana Tech, is active both in Democratic politics and community affairs, and works on behalf of black-supported candidates. Plaintiff Susan Singleton is of Asian descent and shares her co-plaintiffs' concern that Louisiana politics is becoming increasingly structured along racial lines.

In 1991, as both Appellants note, the Louisiana legislature redistricted the eight-member Board of Elementary and Secondary Education (BESE). Initially, the legislature created one compact majority-minority district (in New Orleans) but the Justice Department denied VRA Section 5 preclearance unless and until a second "safe" black district was established. DOJ's refusal to preclear Louisiana's *eight-member* BESE plan led some to believe that the Justice Department would require two "safe" black seats when it redrew the lines for the newly-reduced, *seven-member* Louisiana Congressional delegation.

It was not until the spring of 1992 that the Louisiana Legislature finally began to debate how the boundaries of Louisiana's seven congressional districts were to be drawn. Act 42 was passed by the legislature and signed by the Governor in June of 1992. Ray Hays, who had opposed drawing district boundaries along racial lines during the legislative debates, immediately filed suit with his fellow plaintiffs under the United States Constitution, the Louisiana Constitution, and VRA Section 2. Following a two-day trial in August 1992 and a further evidentiary hearing after this Court's *Shaw* decision, a three-judge panel, consisting of Circuit Judge Wiener (from Shreveport) and District Judges Shaw and Walter (from Lafayette and Shreveport respectively) invalidated Act 42. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993).

B. The Challenge to Act 42

Challenged on constitutional grounds, Act 42 was destined to fail from its inception. The map of Act 42's districts screamed out that something was amiss. Its appearance alone was enough to persuade the court that Act 42 was a racial gerrymander under *Shaw v. Reno*:

> District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles. A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, as it winds along its erratic path, District 4 projects myriad diverticulae to encapsulate small sacs of otherwise widely dispersed black voters. No one could claim that District 4 is compact, at least not with a straight face.

(U.S. J.S. App. 64a-65a). The court further noted that "at some places along its attenuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of

contiguity." (U.S. J.S. App. 65a). Overall, District 4 encompassed only four whole parishes, and slivers of 24 others, leading the panel to conclude that "[o]n the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the legislature engaged in racial gerrymandering." (U.S. J.S. App. 63a).

While District 4's contorted shape was enough for the court to conclude that it "rationally cannot be understood as anything other than an effort to segregate voters on the basis of race," *Shaw*, 113 S. Ct. at 2826 (citations omitted), the panel did not stop there. Instead, it listened to the State's own witnesses. For example, Willie Hunter, a black state legislator, testified that the Legislature's intention "was to create a district where there was an excellent possibility of having another black elected . . ., and that to accomplish this they 'looked at numbers [of black voters] period.'" Professor Engstrom, the State's expert witness admitted unashamedly that "race drove . . . [the creation of] . . . the Districts." In response to the court's query whether the Legislature had created a racial gerrymander, Defendants' counsel bluntly admitted that it had, insisting that segregating voters by race is "exactly what [the Legislature] can do . . . ." (U.S. J.S. App. 75a).

At a second evidentiary hearing following this Court's *Shaw* decision, the witnesses were more guarded, but still could not disguise the racial basis for Act 42. According to one legislator, "[i]t was the intent of the Legislature to create . . . [a] . . . second majority black district." (U.S. J.S. App. 76a). The State's experts again admitted, albeit more circumspectly, that "the primary determinant" of the questioned districts was race. (U.S. J.S. App. 76a.). Summarizing the testimony from the initial trial and the post-*Shaw* evidentiary hearing, the court observed that "[n]ot one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering—not one." (U.S. J.S. App. 76a).

The panel was reluctant to attribute the stark race-based thinking underlying Act 42 only to the State. To the contrary, the panel found that the Department of Justice:

> must be regarded as an active player in this case. . . . [t]he testimony at the Trial and at the Evidentiary Hearing reflected overwhelmingly that the Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* "safe" black districts out of seven.

(U.S. J.S. App. 53a n.21). DOJ had "arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies, rather than as a shield to prevent lamentable historical abuses." (U.S. J.S. App. 57a n.21). Kowtowing to the Justice Department, however, was only part of the story. Indispensable support for the plan came from Republicans, who "perceived various benefits in the correlative whitening of some districts that attends the intentional segregation of black voters into other adjacent districts." (U.S. J.S. App. 77a).

C. The Legislature's Replacement of Act 42 with Act 1 and the Three-Judge Panel's Subsequent Invalidation of Act 1

Before this Court could consider the case, the State legislature held a special legislative session that began on April 18, 1994, and one week later replaced Act 42 with Act 1. Act 1 still segregated the state into two black and five white districts, but substituted for the former "Zorro District" a new configuration in the form of a narrow wedge, splitting the state along three quarters of its width, clawing concentrated enclaves of black voters away from their white neighbors. As subsequently described by the court, the new District 4 "cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State."

(U.S. J.S. App. 3a). It is telling that although blacks comprise only 30% of the population of the parishes split by District 4, the portions of those parishes included within District 4 are over 60% black.[1] Despite substituting a wedge for the old "Z", the same race-based intentions and even more blatant prodding from the Justice Department explained Act 1.

1. The Court's Factual Findings

The same panel of judges that reviewed Act 42 held a two-day trial on Act 1 in July 1994. The court was provided five volumes of materials from the legislative proceedings, including transcripts of committee hearings in both Houses, as well as audiotapes of legislative debates and dozens of exhibits and maps that illustrated the parishes and cities split by Act 1. During the trial, the court heard from two State Senators, the State Senate's assistant secretary, and two expert witnesses—a geographer and a sociologist. Overall, the court concluded that

> Misinterpreting our opinion of December 1993 as approving a racially gerrymandered district if it contained no more than 55% minority registered voters; and remaining convinced that the Department of Justice would not pre-clear any plan that did not contain two majority/minority districts, the legislature embarked on an endeavor to comply with those demands and still secure adoption.

(U.S. J.S. App. 4a).

The court incorporated by reference the prior opinion and factual findings regarding Act 42. The court began, as

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[1] The demographic statistics on District 4's split parishes are attached as Appendix A at 1a-3a. Ascension Parish, for example, is at the far eastern point of District 4 and is split by a sharp point. (*See* map at App. 19a). Although Ascension is only about 24% black, the wedge that District 4 cuts from it is about 68% black. (*See* App. 3a).

before, with the odd shape of District 4. As with Act 42, the court found that "[t]hose persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature." (U.S. J.S. App. 4a). The court dismissed the race-neutral explanations belatedly espoused by the State's witnesses as simply not credible. The following is a sample of that evidence, all of it ignored by Louisiana and the United States in their Jurisdictional Statements.

The Senate Committee, for example, heard testimony from community leaders on the redistricting. One group, referred to by Senator Brinkhaus as "the '2' group supporting two" (Sen. Comm. Tr. 118)[2] spoke almost entirely about race. One member urged

> black people need to have two [majority districts], and we want nothing less. . . . You know we deserve two majority districts, I don't have to draw a map for you to know that. With all of the black people in this State, certainly we should have two majority districts.

(Sen. Comm. Tr. 94-95). Another asserted "[a]nd all we're asking for is give us two, that *we have a voice in Washington to help us*." (Sen. Comm. Tr. 112) (emphasis added). Still another demanded: "give us no less than two Congressmen." (Sen. Comm. Tr. 115).

Many of the Senators' and Representatives' speeches reflected a similar racial theme. Senator Bajoie, a leader of the Legislative Black Caucus, stated that "in order for African-Americans in Louisiana to elect Congressional members of their choice, [we] should retain two majority African-American

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[2] Hearing Before the Committee on Senate and Governmental Affairs of the Louisiana Senate, April 18, 1994 (Appendix B of Plaintiff's Motion for Preliminary Injunction and Amended Complaint).

districts with a majority voting age population and nothing less is acceptable." (Sen. Comm. Tr. 70-71).[3] Concerning an alternative plan on the House floor, one Representative stated that "[i]t was absolutely necessary to get a minority district. I make no bones about it. The intent of this plan was to have two North Louisiana districts and two minority districts." (House Comm. Tr. 107).[4]

The chorus of "two and nothing less" was amplified by the previous demands of the Justice Department. Senator Brinkhaus lamented that "[m]ost members of the Congressional Delegation recognize the plan is about the best that can be drawn and still satisfy the U.S. Justice Department and Federal Court." (Sen. Comm. Tr. 214). A prominent Representative agreed: "the testimony given this committee was that we had to draw two minority districts or the Justice Department would not approve it." (House Comm. Tr. 51).

With support for two black districts hanging in the balance, the Justice Department took a more aggressive role. On April 20, two days after the House and Senate committee hearings, the Assistant Attorney General informed the Louisiana Legislative Black Caucus of DOJ's views.[5] Expressly noting that "the Louisiana legislature is now in session" to consider "a new congressional redistricting plan," the Assistant Attorney General opined that "it remains

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[3] In comparing two bills, each with two majority-minority districts, another Senator voiced support for the bill that had a greater minority population in District 4: "I think that will be important to assure the maintenance and the viability of two seats that are, could be represented by African Americans." (Sen. Comm. Tr. 74).

[4] Hearing before the Committee on House and Governmental Affairs of the Louisiana House of Representatives, April 18, 1994. (Appendix C of Plaintiff's Motion for Preliminary Injunction and Amended Complaint).

[5] The letter was addressed to the Lawyers' Committee for Civil Rights Under Law, which has provided legal representation to the Black Caucus as an amicus in the litigation below.

reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts. Moreover, such a plan can be devised in a way that would not run afoul of the Supreme Court's ruling in *Shaw v. Reno.*"[6] Five days after this letter was sent, Act 1 passed both houses of the Legislature.

In the 1994 trial, the State proffered many supposedly race-neutral reasons for Act 1, including a claim that District 4 was modeled after an older district (the "old Eighth"). The court refused, however, to credit the "old Eighth" and similar rationalizations: "The State's purported reliance on District Four's similarity to the 'old Eighth' is mere pretext." (U.S. J.S. App. 5a). The legislative transcripts also rebut any claim that the legislature had followed traditional districting standards: "I'm not going to wiffle-waffle with you on commonality interest [sic]. Specifically, that was the intent of why this plan was drawn because in my opinion the basic perception of the legislature is an interest in having two minority districts." (House Comm. Tr. 107).

2. The Court's Legal Conclusions

Based on the testimony and exhibits before it, the court found that the map of Act 1 alone "raises the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." This and other evidence showed that "the *fundamental factor driving Act 1 was race*." (U.S. J.S. App. 3a-5a.). In response to the

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[6] The propriety of this letter is questionable in light of the Justice Department's own regulations, 28 C.F.R. § 51.22(b) (1993). But this is not the first case involving such involvement by the Justice Department. *See Johnson v. Miller,* No. 194-008, 1994 WL 506780 at *4-11(S.D. Ga. Sept. 12, 1994) (calling DOJ practices "disturbing"; observing that "in a notable faux pas, DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press.") The Assistant Attorney General's letter is attached as Appendix B at 4a-7a.

court's finding of a racial gerrymander under *Shaw*, the State offered two putative compelling interests to justify Act 1: first, compliance with the Voting Rights Act, and second, the need to remedy past discrimination. The court found neither rationale persuasive.

Regarding VRA compliance, the panel relied on this Court's precedents holding that Section 5 of VRA bars states subject to preclearance from allowing retrogression of minority voting strength, or from denying minorities the right to vote. Neither the United States nor Louisiana offered evidence that the failure to create two black districts would violate these tests. (U.S. J.S. App. 8a.). Nor could VRA Section 2 provide the missing compelling justification. (*Id.*). *Thornburg v. Gingles*, 478 U.S. 30 (1986), makes a compact minority population a necessary element of a claim under VRA Section 2. Relying on the State's own witnesses, the court found that District 4 of Act 1 is not compact within the meaning of *Gingles*, thus precluding compliance with VRA Section 2 as a compelling state of interest. (U.S. J.S. App. 8a). Likewise, on the issue of lingering discrimination, the court found insufficient evidence of the type of ongoing racial discrimination in Louisiana voting practices that might justify racial gerrymandering—a practice the court characterized as "[u]sing the disease as the cure." (U.S. J.S. App. 7a.).[7] In short, "when the State cannot, or has not, offered and supported an extraordinary justification for these questionable measures, the race-conscious enactments must fall." (U.S. J.S. App. 12a).

GROUNDS FOR AFFIRMANCE

Appellants' request that this Court note probable jurisdiction rests fundamentally on an out-of-context observation by the court that was not essential to its holding.

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[7] *See also Johnson v. DeGrandy*, 114 S. Ct. 2647, 2661 (1994) ("for all the virtues of majority-minority districts, they rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best.' ").

Specifically, the United States relies on the court's statement that "race conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." (U.S. J.S. 10). If race-consciousness were all that was before it, the court would not have engaged in extensive fact-finding, using maps, demographics, and parish lines as guides. The court's inquiry revealed all of the indicia of a gerrymandering claim.

First, as in *Shaw*, was the shape of the District 4. Both the original District 4 in Act 42 and its progeny in Act 1 meander nearly the full length of Louisiana, splitting parishes while engulfing concentrations of black voters and exiling white voters to adjacent Districts. *See* Section I.B. *infra*. Careful examination of the lines drawn by District 4, as well as the racial composition of included and excluded areas, leads inevitably to one conclusion—race was the predominant if not exclusive consideration behind the formulation of Act 1's districts. The court correctly found that Louisiana's attempt to paper over the predominance of race by analogizing District 4 to the segregationist-era "old Eighth" was transparently pretextual. The old Eighth was used as a starting point precisely because it had a significant black population and then was transmogrified into a majority minority district by excluding white parishes (and parts of parishes) while adding other areas for manifestly racial reasons. *See* Section I.B.2. *infra*.

Appellants argue that the Voting Rights Act often requires "race-conscious redistricting," and that the "inevitable result" of the decision below "will be to chill voluntary compliance by the States." (U.S. J.S. 11-12). But the decision below neither depends upon "race-conscious redistricting," divorced from the facts here, nor is it in conflict with the decisions of the four other post-*Shaw* district court decisions.

Appellants pretend there is a conflict over the quantum of race-consciousness that triggers strict scrutiny but their real position is that, while "this Court [in *Shaw*] provided some

general guidance on how to determine whether a state has a compelling interest in creating a majority-minority district," this case would enable the Court to provide more concrete guidance. (U.S. J.S. 17). To be sure, lower courts may need guidance in close cases; but here the evidence is so strong that the decision below can be affirmed based on *Shaw* and this Court's existing voting rights decisions.

Neither the United States nor Louisiana argue (nor can they) that a second majority minority district is necessary in Louisiana in order to avoid "retrogression." *Beer v. United States*, 425 U.S. 130, 141 (1976). The United States offers instead an interpretation of VRA Section 5 which imposes on covered states the task of proving that the failure to include any specific measure desired by DOJ officials would be "free from discriminatory purpose." (U.S. J.S. 19). The absence of such proof then would be allowed to substitute for actual proof of the three *Gingles* criteria under VRA Section 2, *Growe v. Emison*, 113 S. Ct. 1075, 1083 (1993), or the "strong basis in evidence" required in order to justify state-initiated affirmative action. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); (U.S. J.S. 18).

This far-reaching assertion of Justice Department authority raises a variety of statutory interpretation and constitutional questions under Sections 5 and 2 referenced in this Court's previous decisions. *See* e.g., *Holder v. Hall*, 114 S. Ct. 2581, 259 (1994) (Thomas J. concurring in the judgment); *Chisom v. Roemer*, 111 S. Ct. 2354, 2375-76 (1991) (Kennedy J. dissenting); *United Jewish Org. of Williamsburg v. Carey*, 430 U.S. 144, 168 (1977) (Brennan J., concurring); *South Carolina v. Katzenbach*, 383 U.S. 301, 355 (1966) (Black J., concurring and dissenting). Such issues need not be reached in this case, however, because even the United States concedes that Louisiana must prove that it "reasonably believe[d] that its failure [to include a second majority minority district] would lead to a prima facie case of discrimination

against it." (U.S. J.S. 18). Here, apart from generalized statements about long-since-cured voting rights abuses, neither the United States nor Louisiana offers any concrete evidence to support the prima facie case on which its theory might be predicated. On this record, therefore, the district court's factual findings are dispositive and its judgment should be affirmed.

I. THERE IS NO BASIS TO DISTURB THE DISTRICT COURT'S FINDING THAT DISTRICT 4 RATIONALLY CAN BE UNDERSTOOD ONLY AS AN EFFORT TO SEGREGATE VOTERS BY RACE

The district court found that, given the irregular shape of District 4 and the racial makeup of its districts, "District 4 is 'so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting.' *Shaw v. Reno*, 113 S. Ct. 2816 (1993)." (U.S. J.S. 3a). That unanimous factual finding is enough under a straightforward reading of *Shaw* to affirm the district court.

Appellants emphasize the court's statement that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." (U.S. J.S. 10-11; La. J.S. 12-13). But whatever might be read into that statement, and whatever disagreement among the lower courts one might perceive on *that* issue, this much is clear: *Shaw* requires that bizarre and unexplained districts be subjected to strict scrutiny. This Court's time is not well-spent re-examining whether the district court found the proper quantum of bizarreness to sustain a *Shaw* claim, especially given that District 4 is not, on its face, even a close call.

A. The *Shaw* Decision

In *Shaw*, this Court found that the districting scheme before it was so bizarre on its face that it was "unexplainable on grounds other than race." The constitutional violation was not the odd shape of the district itself, but instead what the oddly-

shaped district indisputably proved—that the district boundaries were determined by race. The *Shaw* Court likened such bizarre districts to the "uncouth twenty-eight-sided" municipal boundary line at issue in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). As in *Shaw*, the statute in *Gomillion* was race-neutral—it contained no express racial classifications. However, the effect of transforming Tuskegee's boundaries from a square to a wild and unexplainable figure with twenty-eight sides was to remove from the city limits virtually all black voters while retaining its white voters. The net result of *Gomillion*'s facially race-neutral statute, therefore, was to segregate voters by race, and provide compelling evidence of unconstitutional and discriminatory intent.

The majority in *Gomillion* formally relied on the Fifteenth Amendment. *Id.* at 342-348. But Justice Whittaker's concurrence noted that unlawful segregation of voters into different districts also implicated the Equal Protection Clause. *Id.* at 348 (Whittaker, J. concurring). As the Court recognized in *Shaw*, *Gomillion's* progeny establish that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw*, 113 S. Ct. 2826.

The contribution of *Shaw*, therefore, was simply to clarify one acceptable method of proving a kind of claim recognized under *Gomillion*. Under *Shaw*, a claim of racial gerrymandering can be shown by a bizarre district plan provided that the state can attempt to justify the district with genuine claims that the lines drawn can be explained by districting practices rather than race.

B. Under *Shaw*, District 4 Is So Bizarre On Its Face That It Can Be Explained Only As A Racial Gerrymander

The district court applied *Shaw* strictly and narrowly. The court first found that the district was so bizarre on its face as to compel the initial inference of a racial gerrymander. (U.S. J.S. App. 3a). It then allowed the State the opportunity to rebut that inference with justifications based on "traditional districting principles." *Shaw*, 113 S. Ct. at 2827. The State offered two principal justifications: that District 4 was unified by common interests, and that it was modeled after the old Eighth District. After reviewing the evidence, the district court made a simple credibility determination: one of the justifications was "clearly a *post hoc* rationalization," the other "mere pretext." (U.S. J.S. App. 5a). The Court found insubstantial the remaining flurry of excuses offered by the State. Each of these findings is reviewed below.

1. District 4 is Bizarre

The district court chided the State: after Act 42, "we called for major surgery. Act 1 is at best a cosmetic makeover." (U.S. J.S. App. 3a n.1). The concurring opinion stated that "it appears as if someone knocked over an inkwell somewhere around Waskom, Texas, spilling ink aimlessly across the map of Louisiana. There is simply nothing regular about the contours of District 4." (U.S. J.S. App. 15a). This characterization, like the "mark of Zorro" description in the court's first opinion, captures the essence of the racial gerrymander, confirmed by the map and the demographics of the territory District 4 encompasses (and equally important the territory it does not). The map of District 4 is contorted if seen from an overhead view of the entire state; a closer look at the

boundary lines in the split parishes reveals that District 4 splits political subdivisions along questionable lines, as well.[8]

Just as the use of traditional districting principles can "defeat a claim that a district has been gerrymandered on racial lines," *Shaw*, 113 S. Ct. at 2827, so too a plan which jettisons these considerations is more likely a gerrymander. An examination of traditional districting factors underscores the oddity of Act 1's boundaries:

First, Act 1 pays little heed to political subdivisions. District 4 contains only three whole parishes. The boundary of District 4 racially divides four of the state's major cities—Shreveport, Baton Rouge, Lafayette, and Alexandria—all "in its efforts to capture sufficient pockets of African-American voters." (U.S. J.S. App. 16a; *See* App. 9a, 12a, 16a, 14a). The United States responds that every districting plan will inevitably split parishes, and that the court-imposed plan splits six parishes. (U.S. J.S. 16-17). But District 4 alone contains twelve split parishes of the sixteen parishes split in Act 1. Although there is no magic number of allowed split parishes, it is remarkable that District 4 splits 80% of the parishes it touches.

Second, District 4 is not compact. It spans a distance of over 250 miles, but in some connecting points is only a few miles across. Districts of regular geometric shape are generally considered compact, whereas districts that enclose small areas with long, meandering boundaries are not. Although there is no absolute measure of compactness, the wedge District 4 drives through the heart of Louisiana is far less compact than any of Act 1's other districts, or than any of the districts in the court's plan. As noted in the concurring opinion of Chief Judge Shaw, "[a] district that stretches over as much territory touching so many media and population centers, cannot be said

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[8] The maps of the split parishes are attached as Appendix C at 8a-20a.

to be compact." (U.S. J.S. App. 16a). The response of the Appellants is that the new District 4 is not as bad as the old: "Unlike old District 4, it does not meander over disconnected parts of the State, nor is it comprised of a series of 'fingers' reaching out from the core." (U.S. J.S. 14; *see also* La. J.S. 19 n.18). But surely old District 4—perhaps the most contorted district ever challenged in the federal courts—is not the proper benchmark for judging compactness.

Third, District 4 is not united by a meaningful commonality of interest.[9] The district court's concurring opinion observed that

> District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles. The district encompasses North, Central, and South Louisiana, each of which has its own unique identity, interests, culture and history. The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber.

(U.S. J.S. App. 17a). In response, the United States claims that *parts* of District 4 encompass commonalities of interest: "The area along the Red River Valley is also an important economic region and the people in that region share common interests." (U.S. J.S. 6). But the inquiry must be whether the District generally—not merely a portion of it—is united by a common interest. As one legislator queried, "what local interest can Shreveport and Baton Rouge[10] have together? It just boggles

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[9] As the court noted in its December 1993 opinion, "[a]ny able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district." (U.S. J.S. App. 71a).

[10] Shreveport and Baton Rouge are more than 200 miles apart in District 4.

the mind that we can sit in here and look at each other with straight faces and say that." (House Comm. Tr. 58-59).

Fourth, the record shows that the drafters of Act 1 sacrificed all of the traditional districting standards in order to achieve a higher black population in District 4. While the United States suggests otherwise, Act 1 reflects "a single-minded pursuit of racial goals, with little or no consideration for other districting values." (U.S. J.S. 14). The most notable deviation from traditional standards—parish splitting—fenced 77% of the whites in the split parishes out of District 4, while corralling about 82% of the blacks in the split parishes into District 4. The odd appendages of District 4 also grasp at black voters. For example, the spur extending from District 4 at its northwest tip carves out a gnarled portion of Caddo Parish where 34,000 blacks live in the Shreveport area.[11] Just as in *Shaw*, "[the] State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Shaw*, 113 S. Ct. at 2827.

2. The State Failed to Justify Act 1 on Race-Neutral Grounds

The district court acknowledged that "if the state advances a legitimate, non-racial explanation for the plan's irregularity, then the factfinder must—as always—weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering." (U.S. J.S. App. 58a). The State attempted to make such a showing when it argued that District followed the "old Eighth" District of elections past. Despite the court's finding that this contention was merely a post hoc

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[11] *See* App. 1a, 9a. This portion of Caddo parish is home to more than 10% of all of the blacks in the entire District 4.

rationalization,[12] the appellants revive the arguments that "the district resembles the Eighth District . . . from 1967-72" (U.S. J.S. 13), and "the plans in use between 1973 and 1992 also contained a district in the same general area." (U.S. J.S. 14). The facts are not quite so simple:

First, District 4 does not approximate any particular configuration of the old Eighth. There are six entire parishes that were included in the old Eighth from 1967 to 1972 that are completely shorn from District 4. Likewise, two full parishes in District 4 are absent from the configurations of the old Eighth from 1973-92 (*Cf.* U.S. J.S. App. 110a with 111a-114a).

Second, District 4 follows or deviates from the old Eighth principally when doing so furthers the goal of increasing the proportion of black voters in the district. The record shows that District 4 adds enclaves of black population to the old Eighth, and jettisons parts from the old Eighth that are predominately white. Much of District 4, including the cities of Shreveport (in Caddo parish) and Lafayette (in Lafayette parish), was never included in *any* configuration of the old Eighth. (*See* U.S. J.S. App. 110a-114a). But District 4 sends out tentacles to these two cities and carves out parts of the parishes in which they sit. This sacrifice of adherence to the old Eighth picks up regions that are 67% black. (*See* Appendix A). On the other hand, Avoyelles parish, which is included in *every* configuration of the old Eighth, is conspicuously absent

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[12] The argument of the United States on this score is schizophrenic. First, the United States contends that "the relevant inquiry under *Shaw* is whether a district is so bizarre *on its face* that it can be understood only as a racial gerrymander. Those terms mandate an *objective inquiry, not an inquiry into the legislature's subjective intent* based on after-the-fact statements." (U.S. J.S. 15) (emphasis added). Later, however, the United States describes the purpose of the old Eighth evidence as "to show that *the State was attempting to draw a majority-minority district in a way that was consistent with other traditional redistricting interests*." (U.S. J.S. 16) (emphasis added).

from District 4. Avoyelles parish is 72% white. (*See* U.S. J.S. App. 110a-114a; Def. Trial Ex. 4).

Third, one of the State's own witnesses—Mr. Koepp, who was charged with drawing the map of Act 1—revealed that the old Eighth was chosen for the purpose of concentrating black voters into another black district: "I was asked to look at the old Eighth District, the old Eighth District being the highest minority population district in the state other than the minority district number two." (7/21/94 Trial Tr. v.2, p. 11). This statement belies any claim that the old Eighth was chosen for the sake of tradition.

C. There Is No Split of Authority About Whether District 4 Is Subject to Strict Scrutiny

Having failed to disprove that District 4 is a presumptive racial gerrymandering under *Shaw*, or otherwise to justify its bizarre boundaries based on traditional districting principles, Appellants resort to hypothesizing a conflict among the post-*Shaw* district court decisions about the lower court's statement here that "race-conscious redistricting, while not always unconstitutional is always subject to strict scrutiny." (U.S. J.S. 10-12). No doubt there are semantic differences in the formulations employed by the various decisions, as noted by the opinion in *Johnson v. Miller*, 1994 WL 506780, at *12-14. These different verbal formulations were not, however, dispositive in this or the other cases.

All of the other district courts but one applied strict scrutiny, and none conflicts with the holding of *Shaw* that a district so bizarre on its face that it can be explained only as a racial gerrymander is subject to strict scrutiny. The only way for this Court to reach the question "whether the intentional creation of a majority-minority district is always subject to strict scrutiny" (U.S. J.S.(I)) is first to conclude that the district court erred when it found that District 4 was bizarre enough to

sustain a *Shaw* claim. Copious geographic and demographic evidence supports the finding by the court on this issue.[13] This alone provides ample reason to affirm the district court on this issue.

II. ACT 1 IS NOT JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST

Because Act 1 must be subjected to strict scrutiny, the law will be sustained only if supported by a compelling state interest.[14] In the district court, the Appellants presented two possible compelling justifications for Act 1 and its creation of a second majority-minority district: compliance with the Voting Rights Act, and remediation of past discrimination. The district court recognized that either justification can, in appropriate cases, serve as a compelling interest, but recognized that this is not such a case. (U.S. J.S. App.7a-10a).

A. The Voting Rights Act Does Not Require Louisiana to Create a Second Majority-Minority District

A State can show a compelling interest in complying with either Section 2 or Section 5 of the VRA. The district court found that the Appellants did not show that Louisiana's actions were required by either section. Appellants argue that the district court "erred in requiring the state to prove an actual violation of federal law as a predicate for drawing a majority-black district." (La. J.S. 20; *see also* U.S. J.S. 18). Appellants contend that there need be only a "strong basis in evidence" to believe that their actions would violate federal law, "a standard that is satisfied if the State reasonably believes that its failure to take the measure would lead to a prima facie case of

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[13] And as with Act 42, voluminous direct evidence of race-based intent supports the court's findings.

[14] As the United States points out, the court never reached the narrow tailoring question because it found no compelling justification for Act 1.

discrimination against it." (U.S. J.S. 18) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292-93 (1986)). Appellees do not agree that a tenuously-supported belief that a plan will violate the Voting Rights Act, or will be denied preclearance by the Attorney General, is enough to establish a compelling interest.

But even assuming, *arguendo*, that a mere reasonable belief would suffice, the State must still make *some* showing to support its claim. The State must make a "prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500. Neither Appellant presented any evidence that would meet even the standard they propose.

1. Section 5

Section 5 of VRA imposes on covered states an affirmative duty to avoid retrogression of minority voting strength, and prohibits plans that have the purpose or effect of denying or abridging the right to vote on racial grounds. The district court found that:

> Neither the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect. Not surprisingly, we can find no support for such a claim either.

(U.S. J.S. App. 8a). The Justice Department bristles at the notion that the State would be required to show that a feared denial of preclearance under Section 5 would be "legally valid". (U.S. J.S. 19). Appellees do not concede that the Justice Department's say-so alone, especially when contrary to the statute and this Court's decisions, is enough to provide a compelling interest to justify racial segregation: *Shaw* recognized only that a State may "have a very strong interest in

complying with federal antidiscrimination laws that are constitutionally *valid as interpreted and as applied.*" 113 S. Ct. at 2830 (emphasis added). The record demonstrates that the State had *no reason at all*, let alone a reasonable basis, to believe that the Justice Department would lawfully deny preclearance to a plan with only one minority district.

One majority-minority district out of seven yields greater minority voting power than a single district out of eight, and could not constitute "retrogression" within any reasonable definition of the term. *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise" does not violate Section 5). Appellants do not attempt to challenge that finding in this Court.[15] Appellants instead claim that the State reasonably believed that it could not show to the Attorney General the requisite lack of discriminatory purpose if it did not create a second majority-minority district. (U.S. J.S. 19; La. J.S. 23).

The only evidence upon which the appellants rely is the DOJ's refusal to clear the BESE board districting, which created only one majority-minority district out of eight. The conclusion: because the State did not prove a lack of discriminatory intent with the BESE board, it would be unable to do so in the case of the newly-reduced seven district plan.

Nowhere do they explain why the State was unable to prove lack of discriminatory purpose in the eight-number BESE board redistricting, much less show how that failure would foredoom the seven-seat congressional redistricting.

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[15] The Justice Department below took a startling position: that because Act 42 provided two majority-minority districts, any later plan would constitute retrogression if it did not also allow two such districts—*even though Act 42 was declared unconstitutional.* (*See* 7/22/94 p.m. Trial Tr. p. 44. This position is directly contrary to DOJ's own regulations, *see* 28 C.F.R. § 51.54(b) (1993), and has since been abandoned.

"Purpose" suggests an inquiry into the reasons for a change, *see City of Richmond v. United States*, 422 U.S. 358 (1975); and yet appellants do not point to a shred of evidence of record that shows that anyone on behalf of the State acted for illegitimate reasons. Nor do they suggest that there are not valid reasons for implementing a plan with only one black majority district but with generally compact, racially-balanced districts that unite common interests. *See id.* at 375 (no discriminatory purpose if there are "objectively verifiable, legitimate reasons" for action). If anything, the record shows that the legislature bent over backward to increase minority voting power—not just to satisfy the extreme demands of the Justice Department, but to satisfy the strange coalition between the "two and nothing less" faction and Republican legislators. Unless the Justice Department would infer a discriminatory purpose merely from the failure to maximize the number of safe black seats without regard to other considerations, it is unclear how the BESE board redistricting or the number of black-controlled districts, standing alone, is relevant in any way to discriminatory purpose.

At bottom, the State relies on the bare assertion that it could not prove the lack of discriminatory purpose as defined by DOJ—despite a well-developed record that proves precisely the opposite. An unsupported assertion cannot create a compelling interest. Without any evidence to support the state's fear, and plenty of evidence to assuage it, all the State has to show a compelling interest is one thing: a letter from DOJ, *written before DOJ had seen any evidence relating to the new redistricting*, baldly asserting that the State had reason to believe it could not gain preclearance under Section 5 without creating another majority black district. Surely such a procedurally irregular letter, manifestly prejudging the issues, cannot form the basis for a compelling state interest justifying the resegregation of Louisiana's voters by race.

2. Section 2

Section 2 of VRA prohibits any change in voting practice or procedure that dilutes the vote of a minority. *Thornburg v. Gingles*, 478 U.S. 30 (1986), established the three requirements of a vote dilution claim: a politically cohesive minority, a bloc-voting majority that consistently can beat minority-supported candidates, and a reasonably compact minority population. The district court found that the minority population outside of District 2 in Louisiana was not compact within the meaning of *Gingles*, and so any Section 2 challenge against a redistricting plan with only one majority-minority district would necessarily fail.

In response, the appellants suggest that because District 4 is as compact as the old Eighth—a district gerrymandered to assure the election of Gillis Long—it satisfies the *Gingles* criterion. (U.S. J.S. 19). But Louisiana admits in its Jurisdictional Statement that the old Eighth was not compact. (La. J.S. 19). And the district court found that District 4 was not compact enough to save the district from strict scrutiny. It would be odd indeed to suggest that Section 2 would *require* a state to draw a district that is presumptively unconstitutional. Where, as here, strict scrutiny has been triggered by a non-compact district, the majority population encompassed within that district must not be compact enough to qualify as a district that is *required* under Section 2.

In any event, the black population within the district is hardly compact. The District is 55% black only because it encompasses parts of Shreveport, Lafayette, Alexandria, and Baton Rouge—regions each densely populated with blacks, but in some cases over two hundred miles apart. Accord, *Johnson v. Miller*, 1994 WL 506780 at *33 ("The populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across

rural counties . . .. DOJ's insistence that they are 'compact' renders the term meaningless.").

B. The State Failed to Show Discrimination In Past Voting Practices

The State insists that District 4 is necessary to "overcom[e] past racial discrimination against the State's black citizens." (La. J.S. 21). But this Court has held that such vague, generalized claims of "societal discrimination" are insufficient to trigger race-based remedial action by the States. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. at 505 (rejecting the claim that "past societal discrimination alone can serve as the basis for rigid racial preferences"); *id.* at 500 (refusing to accord weight to "conclusory" allegations of racial discrimination). Under this Court's precedents, therefore, the district court was correct to conclude that "[w]ithout concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the resegregation of Louisiana by racially configured voting districts is warranted." (U.S. J.S. 10a).

The United States contends that "the State had a compelling interest in ameliorating the effect that racially polarized voting has had on the opportunity for minority voters in Louisiana to elect the candidates of their choice." (U.S. J.S. 20). This is indeed more particular than the claims of Louisiana. But all the United States can say on this point is that "the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect a second representative of their choice." (*Id.*). The argument thus is circular, and takes the form "the State has a compelling interest in creating two safe black districts, because if it didn't, there wouldn't be two safe black districts." Without the link to why past discrimination in

voting *requires* two safe black districts, the argument gets nowhere.

III. APPELLANTS' OTHER ARGUMENTS ARE WITHOUT MERIT

The State has mischaracterized the record and raised a flurry of other issues that have no merit. These issues deserve only brief attention.

A. The Plaintiffs Have Standing to Challenge Act 1

The State contends that the plaintiffs do not have standing to challenge Act 1, because the court below did not find that they had suffered an concrete harm, or that a decision in their favor would offer them a remedy. The opinion of the court in *Shaw* rejected the claim of the dissent that racial gerrymandering is not cognizable without a showing of vote dilution:

> [c]lassifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. . . .
>
> . . . [Racial gerrymandering] reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

113 S. Ct. at 2828 (citation omitted). *Shaw* thus establishes that the plaintiffs as Louisiana voters have suffered a harm cognizable under the Fourteenth Amendment. *See* also *Shaw v. Hunt*, No. 92-202-Civ-5-BR, 1994 WL 449347 at *10

(E.D.N.C. Aug. 1, 1994).[16] *Cf. Batson v. Kentucky*, 476 U.S. 79 (1986).

B. The District Court Did Not Employ Irregular Trial Procedures

The State contends that the district court abused its discretion by not permitting the Defendants to prepare for trial. (La. J.S. 27). The State provides no reason to believe that trial procedures were improper other than a bald assertion that the defendants were prejudiced by an early trial date. An unsupported assertion is insufficient to preserve error in this Court.

Equally unavailing is the argument that the court shifted the burden of proof by ruling for the plaintiffs before they put any witnesses on the stand. (La. J.S. 28). The State's argument is a dressed-up challenge to the sufficiency of the evidence. It is beyond cavil that live witnesses are not the only method (or perhaps even a good method) of proving a gerrymandering claim. Plaintiffs presented voluminous evidence—including maps, legislative transcripts, and demographic statistics—to the district court. This overwhelming evidence, in addition to the defendant's evidence, was surely adequate to allow a reasonable judge to find that the plaintiffs had presented a winning gerrymandering claim under the Fourteenth Amendment.

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[16] Ed Adams, who is black, has suffered a more concrete harm which was remedied by the district court's plan. The demographic statistics of the parishes split between District 4 and District 5 show that the racial gerrymandering of Act 1 "whitened" District 5. (*See* Appendix A.) The district court's plan increased the black population of District 5, in which Ed Adams lives, by 23% over Act 1. (*Cf.* U.S. J.S. App. 36a with Def. Trial Ex. 4.)

CONCLUSION

This case was properly decided under established law and the facts presented in the case. Under *Shaw v. Reno*, the plaintiffs showed that Act 1 could be explained only as the segregation of voters by race. The appellants failed to present any evidence that would allow them to pass the demanding standard of strict scrutiny. The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: October 28, 1994

APPENDIX

APPENDIX A

(From Appendix A, Tab 6 of Plaintiff's Motion for Preliminary Injunction)

RACIAL TABULATION OF COMPONENTS OF SPLIT PARISHES

Parish	District #	Total Reg. Vot.	Total Reg. Wht.	Total Reg. Wht. (%)	Total Reg. Blk.	Total Reg. Blk. (%)
Caddo	4	50,847	16,404	32.3%	34,069	67.0%
	5	72,668	65,588	90.3%	6,455	8.9%
Red River	4	2,427	695	28.6%	1,713	71.3%
	5	3,570	3,153	88.3%	413	11.6%
Natchitoches	4	13,826	7,246	52.4%	6,376	46.1%
	6	6,708	5,850	87.2%	770	11.5%
Rapides	4	28,499	14,316	50.2%	13,943	48.9%
	6	40,432	36,971	91.4%	3,162	7.8%

APPENDIX A
Continued

Parish	District #	Total Reg. Vot.	Total Reg. Wht. (%)		Total Reg. Blk. (%)	
Pointe Coupee	4	6,878	3,137	45.6%	3,739	54.4%
	6	7,672	5,762	75.1%	1,905	24.8%
East Baton Rouge	4	67,057	17,728	26.4%	49,053	73.2%
	6	132,434	121,651	91.9%	9,815	7.4%
St. Landry	4	36,447	18,687	51.3%	17,682	48.5%
	7	12,187	10,186	83.6%	1,956	16.0%
Lafayette	4	17,433	5,607	32.2%	11,784	67.6%
	7	71,825	64,661	90.0%	6,683	9.3%

APPENDIX A
Continued

Parish	District #	Total Reg. Vot.	Total Reg. Wht. (%)		Total Reg. Blk. (%)	
St. Martin	4	18,137	10,617	58.5%	7,477	41.2%
	3	7,766	6,899	88.8%	847	10.9%
Iberville	4	17,129	8,122	47.4%	8,999	52.5%
	3	2,891	2,831	97.6%	59	2.0%
Ascension	4	7,829	2,504	31.9%	5,309	67.8%
	3	26,999	24,833	91.9%	2,076	7.7%

APPENDIX B

April 20, 1994

VIA FACSIMILE TRANSMISSION

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Re: Hays v. Louisiana, No. 92-CV-1522 (W.D. La.)

Dear Ms. Wright and Mr. McDuff:

This responds to your April 15, 1994, letter regarding the Hays v. Louisiana litigation, involving the challenge to Louisiana's 1992 congressional redistricting plan. We welcome your invitation for the Department of Justice to continue to work together with the Louisiana Legislative Black Caucus, which you represent, in our mutual roles as amicus curiae in this litigation.

We are aware that the Louisiana legislature is now in a special session called by Governor Edwards to consider the enactment of a new congressional redistricting plan in light of

the ruling in Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), that Act 42, the congressional redistricting plan adopted in 1992, is unconstitutional and cannot be used in the 1994 elections. While we cannot comment on any particular redistricting plan under consideration, see Procedures for the Administration of Section 5, 28 C.F.R. 51.22, we believe some general observations can be made in light of the evidence adduced during the Hays case, and the general framework of the court's ruling.

In our supplemental brief filed in Hays in August 1993, we argued that the Voting Rights Act provides Louisiana with a compelling interest in drawing two congressional districts in which black voters would have an opportunity to elect candidates of their choice. That is still our view. In undertaking its congressional redistricting, Louisiana had a compelling interest in satisfying its burden of proof under Section 5 of the Voting Rights Act. Avoidance of retrogression of minority voting strength would justify the retention of the black-majority district in New Orleans. But the state also had a strong interest in adopting a plan that would not give rise to an inference of discriminatory purpose, so as to satisfy the "purpose" prong of Section 5. We believe the state was justified in concluding that it would have been unable to meet that burden if it adopted a plan with only one black-majority district, in light of the Attorney General's 1991 objection to the state's plan for the Board of Elementary and Secondary Education. That circumstance, together with the evidence of racially polarized voting in Louisiana and the availability of readily discernible alternatives for a reasonably compact second majority black congressional district, shows that the state had reason to believe a plan with two black-majority districts was necessary to obtain Section 5 preclearance.

We also argued that compliance with Section 2 of the Voting Rights Act gave the state a compelling interest to draw two black-majority congressional districts. Evidence in the record demonstrates that the three preconditions under Thornburg v. Gingles, 478 U.S. 30 (1986), are satisfied, giving Louisiana a strong basis for taking action to avoid a Section 2 violation. The plaintiffs' own plans, developed and presented at trial by Dr. Weber, demonstrate that the black population is sufficiently numerous and geographically compact such that two reasonably compact districts with black voting age population majorities can be drawn. In addition, there is uncontradicted evidence that voting is racially polarized in congressional elections, sufficient to satisfy the second and third Gingles preconditions.

The district court's ruling in Hays does not alter these judgments. In finding the 1992 plan unconstitutional, the district court assumed arguendo that the interests advanced by Louisiana were compelling, but then ruled that District 4 was not "narrowly tailored" to further those interests. The court's ruling is based on its conclusion that a more compact second black-majority district could be drawn and that a district with a lower percentage of black voting age residents would still provide black voters with a realistic opportunity to elect candidates of their choice. We recognize that the state has appealed the ruling in Hays and we concur in the view that Hays is wrongly decided. In fact, we are actively considering what role, if any, we will play in the appeal. Nevertheless, the court's acknowledgement that a more compact district can be drawn supports our position that Louisiana has a compelling justification to create two black-majority districts.

In sum, we believe that, under the totality of circumstances existing in Louisiana, it remains reasonable to conclude that the Voting Rights Act requires the state to devise

a congressional redistricting plan with two black-majority districts. Moreover, such a plan can be devised in a way that would not run afoul of the Supreme Court's ruling in Shaw v. Reno, 113 S. Ct. 2816 (1993), or the district court's ruling in Hays. We recognize that there likely are a variety of plans that would accomplish those objectives and that the choice of which plan to adopt is a matter best left to the discretion of the legislature under our federal system.

Of course, the state must seek preclearence under Section 5, either from the Attorney General or from the District Court for the District of Columbia, of any new plan before it may be implemented in the 1994 elections. Should the state seek administrative preclearence through the Attorney General, we stand ready to conduct our review as expeditiously as possible, so that the state can proceed with its regular election schedule, which provides for candidate filing to occur in July.

I trust this letter provides a basis for us to continue to work together to resolve the Hays litigation in a way that ensures that the voting rights of the citizens of Louisiana are fully protected. If you have any further questions, you should contact Steven H. Rosenbaum, Chief of the Voting Section (202-307-3143).

Sincerely,

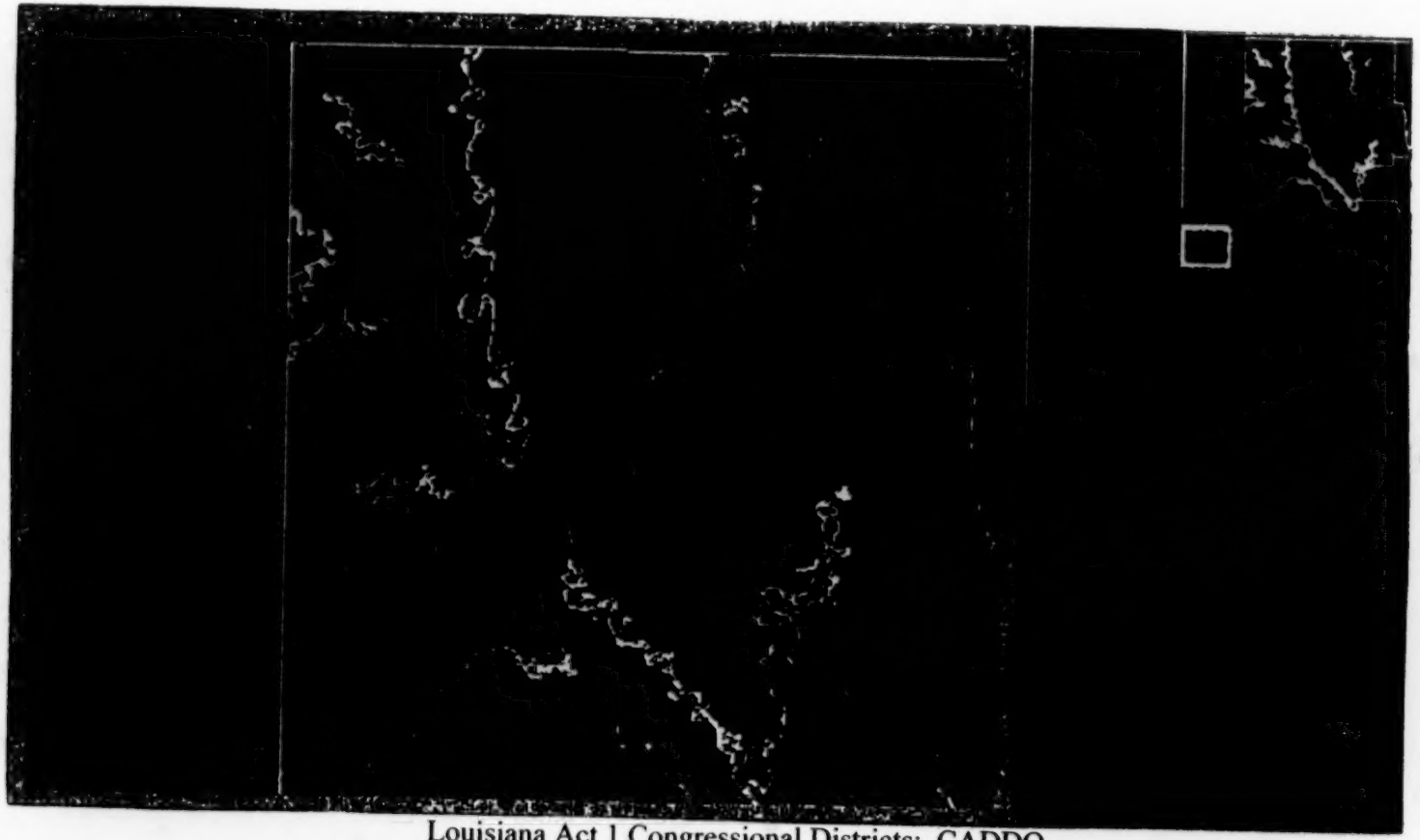
/s/

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

APPENDIX C

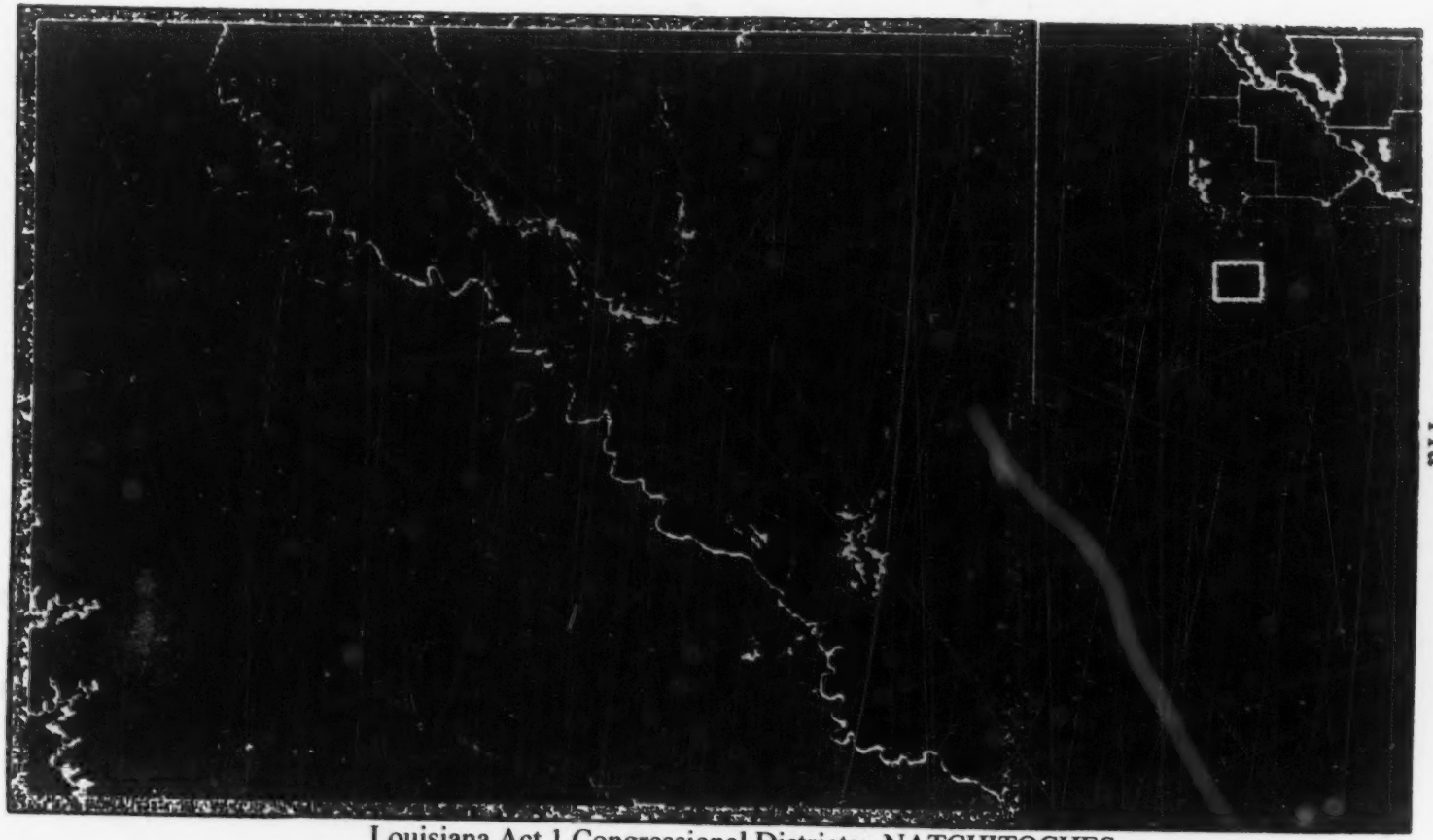
(From Appendix A, Tab 7 of Plaintiff's
Motion for Preliminary Injunction)

Bold yellow lines indicate Parish boundaries.



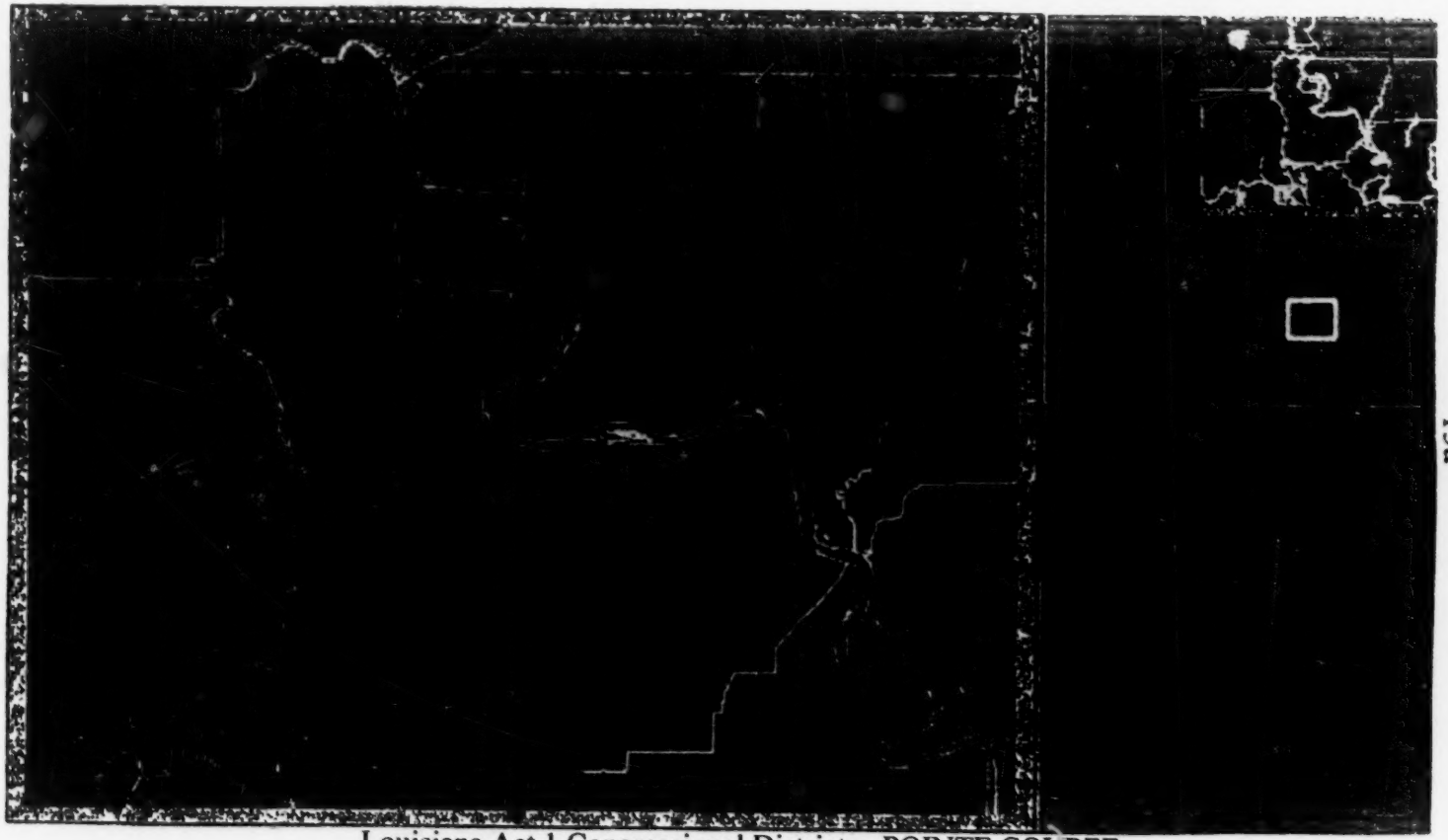
Louisiana Act 1 Congressional Districts: CADDO

Louisiana Act 1 Congressional Districts: RED RIVER

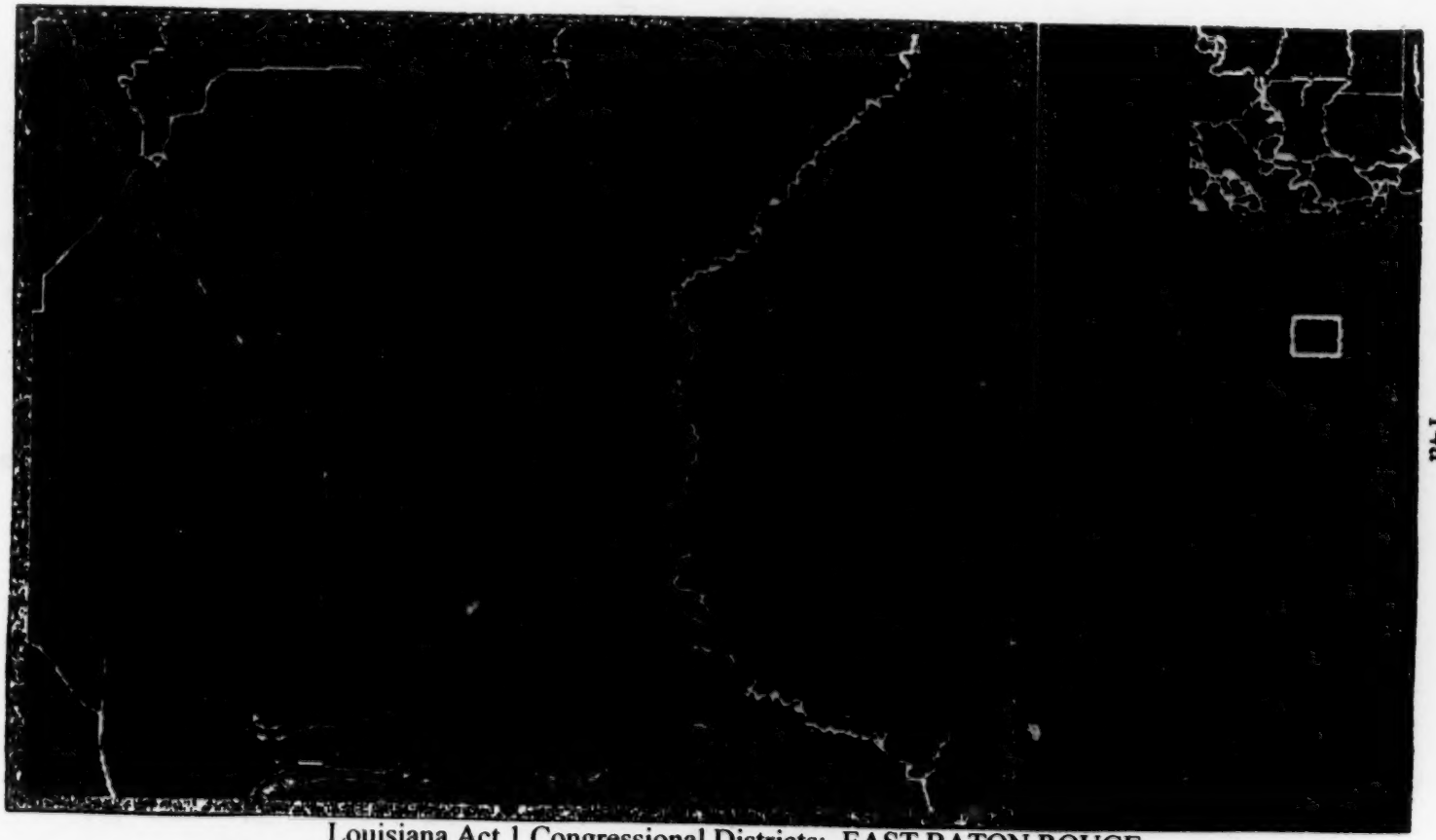


Louisiana Act 1 Congressional Districts: NATCHITOCHES

Louisiana Act 1 Congressional Districts: RAPIDES



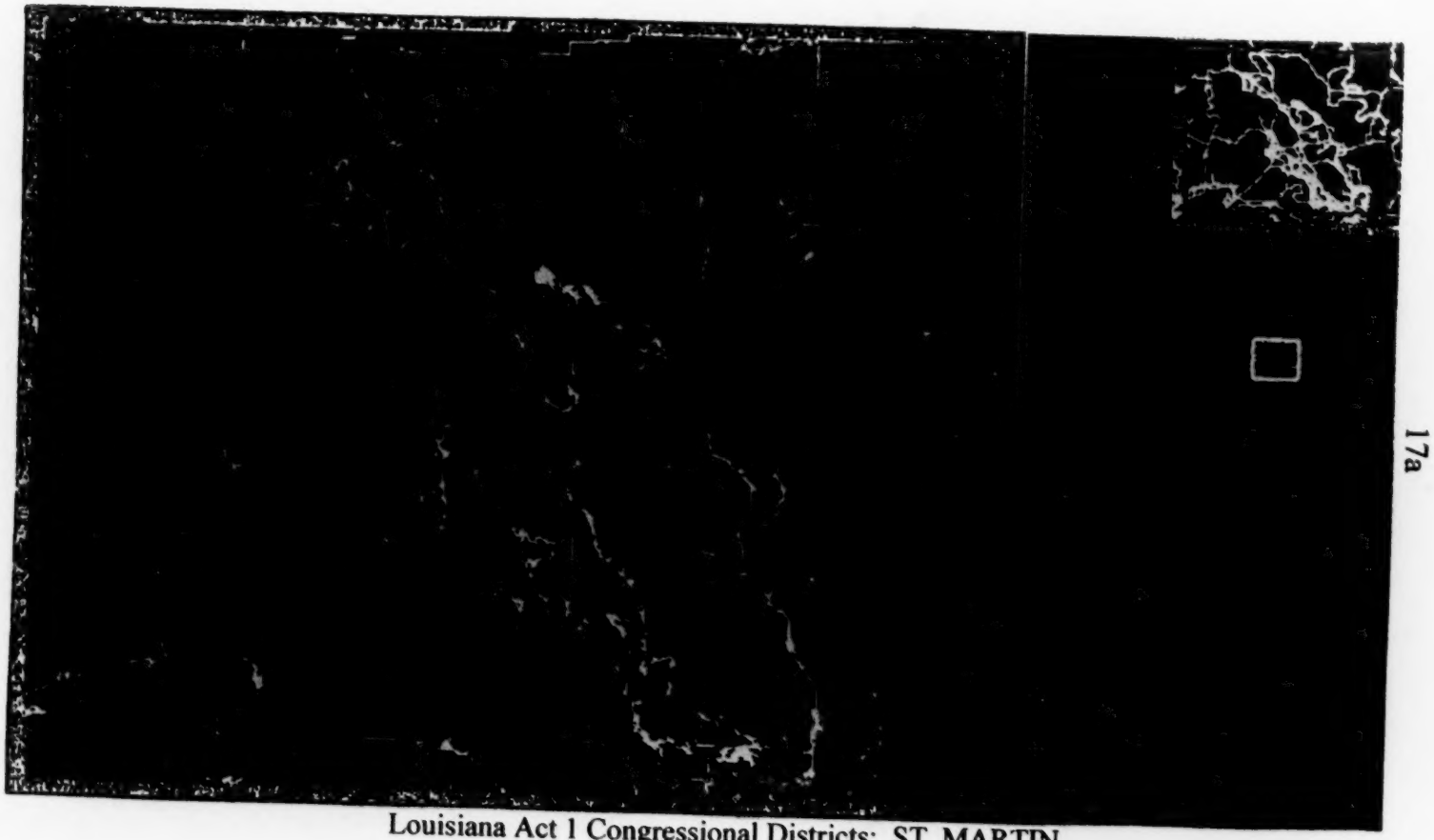
Louisiana Act 1 Congressional Districts: POINTE COUPEE



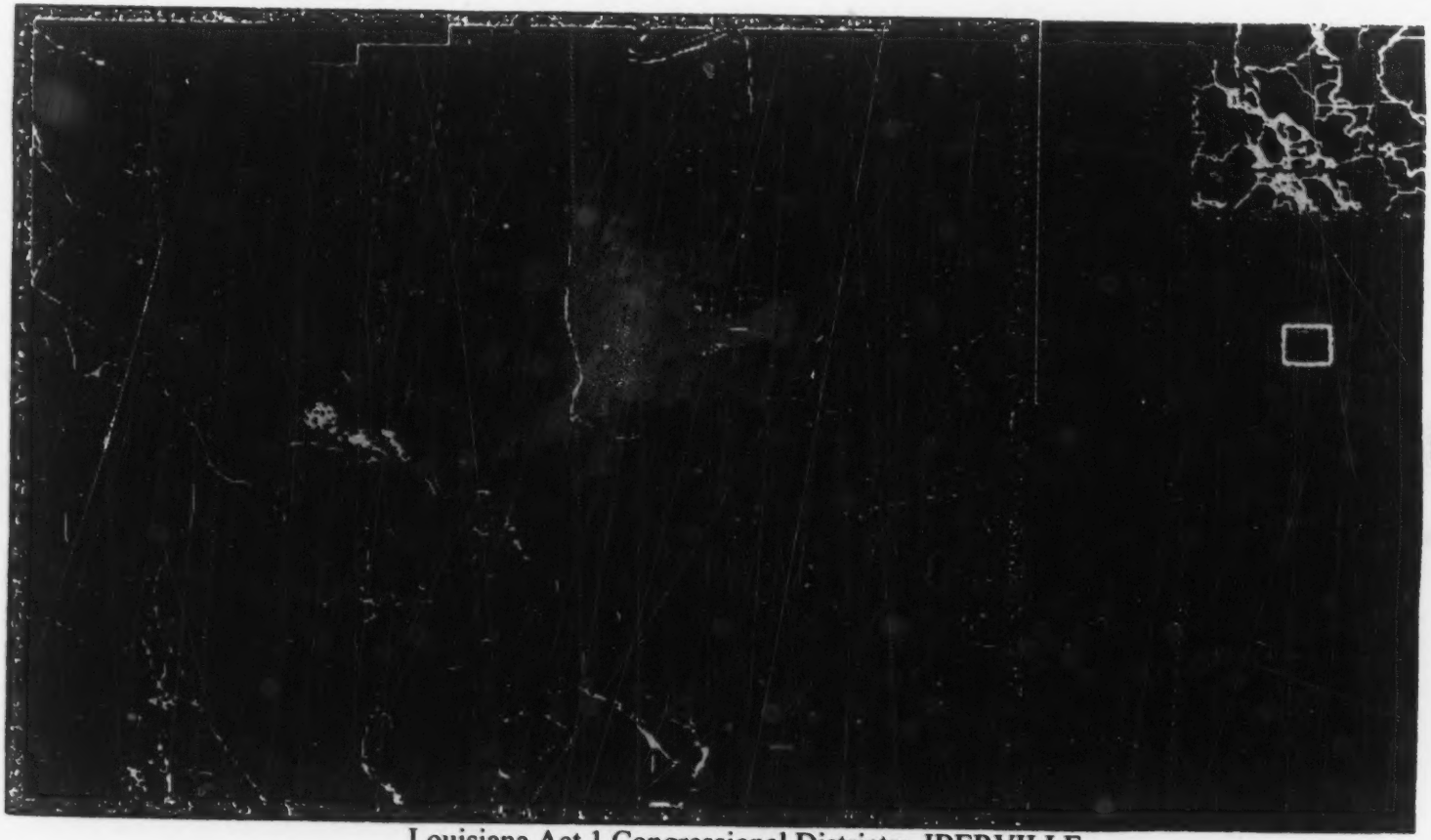
Louisiana Act 1 Congressional Districts: EAST BATON ROUGE

Louisiana Act 1 Congressional Districts: ST. LANDRY

Louisiana Act 1 Congressional Districts: LAFAYETTE

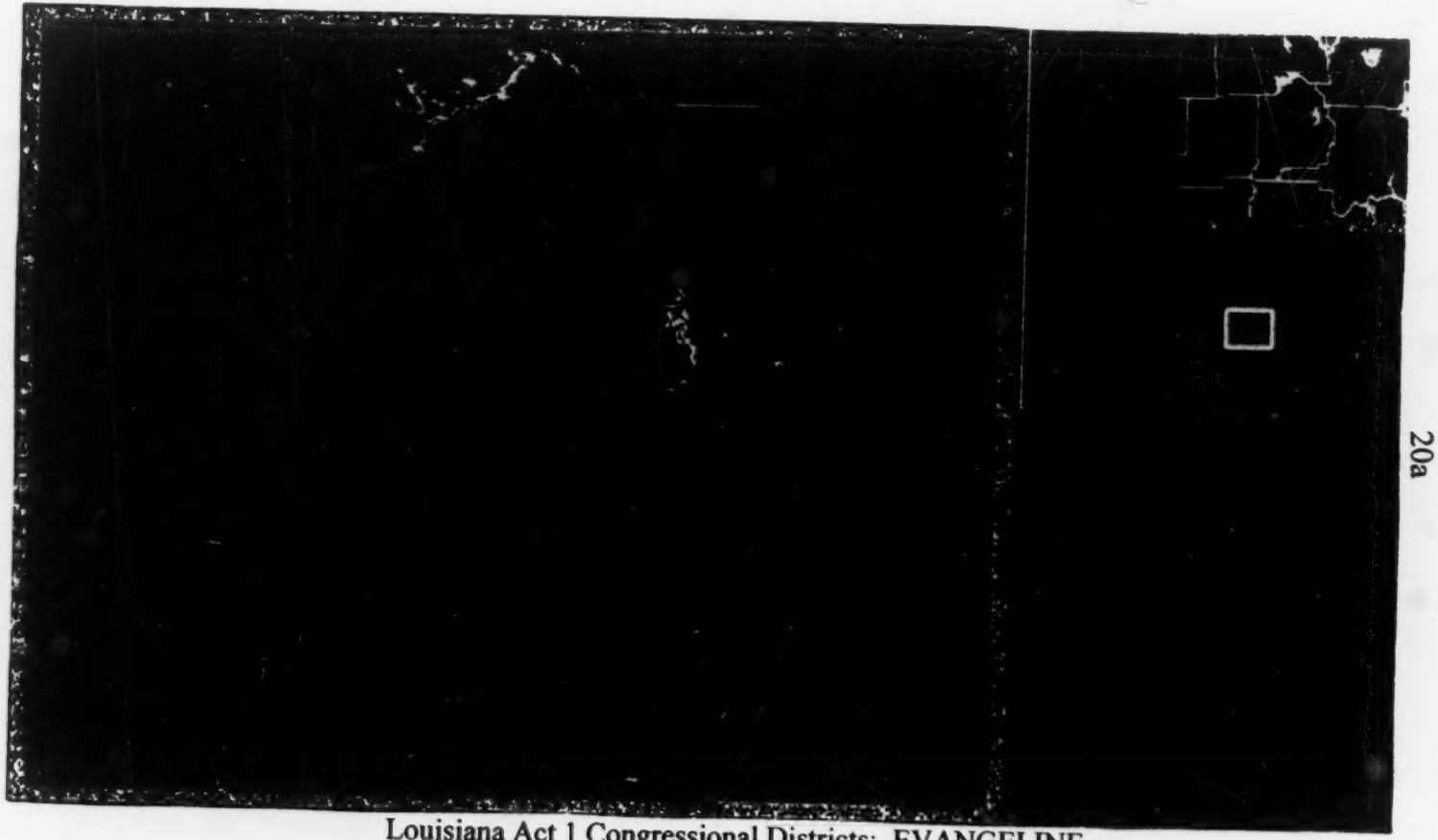


Louisiana Act 1 Congressional Districts: ST. MARTIN



Louisiana Act 1 Congressional Districts: IBERVILLE

Louisiana Act 1 Congressional Districts: ASCENSION



Louisiana Act 1 Congressional Districts: EVANGELINE